

INFORMATION PAPER

CECW-OR
25 April 1997

SUBJECT: Regulatory Court Decision - Tulloch Rule

1. Purpose: To provide the status on a recent court ruling for the District Commander's Conference.

2. Facts:

a. On 23 January 1997, Judge Harris of the District of Columbia District Court invalidated the "Tulloch Rule" and ordered the Corps of Engineers not to apply or enforce the rule, effective immediately. The "Tulloch Rule" regulates all excavation and land clearing in waters of the United States, including wetlands, as discharges of dredged material, i.e. fallback from a dredge bucket, backhoe, bulldozer, or other mechanized equipment.

b. The District Court's decision does not affect two other aspects of the Tulloch Rule which are the Corps regulation of pilings as fill material and the definition of prior converted croplands as not being subject to regulation pursuant to the Clean Water Act.

c. On April 11, 1997, the Corps and the Environmental Protection Agency issued joint guidance to the field regarding implementing the court order. The guidance states that any activity which became regulated solely because of the "incidental fallback," criteria in the Tulloch Rule, will not be subject to any enforcement. The guidance also states that the Corps will not process permits for excavation activities that only involve "incidental fallback", unless requested to do so by applicants in writing. The guidance will also give the field specific examples to assist them in determining how to proceed. The joint agency guidance is consistent with CECC interim guidance issued in three parts on 13 and 20 February and 18 March 1997.

d. The Corps has asked the Department of Justice to appeal the decision. The Corps is also requesting a stay of the order during the appeal to the D.C. Circuit Court. The answer on the request for stay of the order should come in a matter of weeks or months, whereas the appeal decision will likely exceed a year.

e. The DOJ did request clarification from the Court regarding the extent of the Court Order. The Court answered that its injunction against enforcing the incidental fall back portion of the Tulloch Rule applies to all actions, nationwide.

3. This information paper has been approved by MG Russell L. Fuhrman, Director of Civil Works.

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